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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

IDOWU S. FAMUYIWA,

Plaintiff and Appellant,

v.

UPWARD BOUND HOUSE, INC., et al.,

Defendants and Respondents.

B190156

(Los Angeles County  
Super. Ct. No. SC083683)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Jacqueline A. Connor, Judge. Affirmed.

Idowu S. Famuyiwa, in pro. per., for Plaintiff and Appellant.

Horowitz & Clayton, Craig A. Horowitz and Wayne D. Clayton for Defendants  
and Respondents.

## **INTRODUCTION**

Plaintiff and appellant Idowu Famuyiwa (Famuyiwa) sued defendant and respondent Upward Bound House, Inc. (Upward Bound) for alleged failure to pay overtime benefits and for discrimination, among other causes of action. Famuyiwa asserts the trial court erred with respect to a number of rulings favorable to Upward Bounds, including, (1) denying a motion to recuse the trial court judge, (2) sustaining a portion of a demurrer without leave to amend, (3) denying a motion to amend to add additional causes of action, and (4) granting a motion for summary judgment as to the remaining causes of action for discrimination and violation of the implied covenant of good faith and fair dealing. We affirm.

## **PROCEDURAL AND FACTUAL BACKGROUND**

### *1. Upward Bound Employs Famuyiwa*

Upward Bound is a non-profit community organization located in Santa Monica California. Upward Bound provides transitional housing for homeless families with minor children.

In 1997, Upward Bound established a facility called “Family Place” to provide the transitional housing. In November 1999, Upward Bound hired Famuyiwa as its resident manager of the Family Place.

On December 1, 1999, Famuyiwa signed an “at will” employment document, stating in pertinent part: “I understand and acknowledge that my employment relationship with Upward Bound House is on an at-will basis. I understand and agree that either I or the agency may terminate the employment relationship ‘at will’ at any time for any reason, or no reason, with or without cause. This means that the terms and conditions of my employment may be changed with or without cause, including but no[t] limited to, termination, demotion, promotion, transfer, compensation, benefits, duties and locations of work.”

Famuyiwa also signed a “Resident Manager Agreement,” which set forth the terms of his employment. The agreement stated that Upward Bound would pay Famuyiwa \$6.25 per hour. The agreement also stated that Upward Bound would allow Famuyiwa to

occupy a one-bedroom apartment on the property rent free. The agreement stated that the rental value of the apartment was \$675 per month.

On December 6, 1999, Famuyiwa signed Upward Bound's "Employee's Statement of Understanding," acknowledging that his employment was at will.<sup>1</sup> The statement of understanding provided in pertinent part: "[Y]our employment is 'at will' and may be terminated at any time, with or without cause, by either you or us."

2. *Upward Bound Attempts to Restructure Famuyiwa's Terms of Employment*

In January 2001, Upward Bound's executive director, Andrew Parker (Parker), and board of directors determined that it would use the resident manager's unit to provide housing for a homeless family. Upward Bound had hired additional staff to provide 24-hour staff presence, eliminating the need for an on-site resident manager. In addition, the City of Santa Monica informed Upward Bound that it wanted Upward Bound to provide another apartment for a homeless family.

On January 19, 2001, Parker informed Famuyiwa that Upward Bound wanted him to vacate the apartment by the end of February 2001. In consideration, Upward Bound offered to increase Famuyiwa's pay to \$15 per hour and reduce his working hours from 40 to 30 per week. This would have increased Famuyiwa's annual income from \$13,000 to \$23,000.

Famuyiwa did not vacate the apartment. In March 2001, Upward Bound placed Famuyiwa on three months probation for disregard of the request and for failure to carry out job responsibilities. Famuyiwa did not vacate the apartment until after his resignation in May 2003. Upward Bound did not initiate proceedings to evict Famuyiwa.

3. *Famuyiwa Files Wage Claim with Department of Industrial Relations*

In 2001, Famuyiwa filed a claim with the Department of Industrial Relations, Division of Labor Standards Enforcement. He claimed that he had not been paid for 213

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<sup>1</sup> Famuyiwa also acknowledged at his deposition that his employment status was at will.

hours of work from November 1, 1999 to July 5, 2001. He also claimed that he was contractually entitled to \$110 per day as the resident manager's housing allowance.

In October 2001, a deputy labor commissioner met with Famuyiwa to discuss the allegations. On October 16, 2001, the deputy commissioner sent Famuyiwa a letter denying his claim. The deputy commissioner concluded that Famuyiwa did not obtain authorization to work a nine-hour day as opposed to an eight-hour day. He was therefore not entitled to additional hourly compensation. As to the housing allowance, the deputy commissioner explained that the "notation of \$110.77 for housing on your earning statement [was] an acknowledgment that you were provided housing as part of your compensation and does not mean that you are entitled to cash payment in that amount."

The deputy commissioner concluded that there was no evidence of a violation. In addition, the deputy commissioner explained that the Labor Commissioner would not file a claim on Famuyiwa's behalf, and had elected not to hold a hearing on Famuyiwa's claim.<sup>2</sup>

#### 4. *Famuyiwa Resigns*

On May 7, 2003, Famuyiwa submitted a letter of resignation to Upward Bound. Famuyiwa stated that he was resigning due to "discrimination, harassment, . . . and many other pending issues." He also provided Upward Bound with notice that he was vacating the resident manager's apartment.

On May 8, 2003, Upward Bound's executive director, Parker, responded to the letter of the resignation. Parker wrote that he was sorry to hear of the departure. He also noted that despite Upward Bound's request that Famuyiwa vacate his apartment, Parker assumed that Famuyiwa would continue his employment with Upward Bound. Parker also requested that Famuyiwa provide instances in which he felt discrimination, harassment or intimidation while working for Upward Bound.

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<sup>2</sup> The deputy commissioner closed the letter by stating: "The Division of Labor Standards Enforcement will not take further action on your claim and has closed its file."

5. *Famuyiwa Files Suit*

On August 10, 2004, Famuyiwa filed suit against Upward House and its executive director, Parker (collectively defendants). Famuyiwa filed the action as a limited jurisdiction case.<sup>3</sup> He alleged two causes of action: one for overtime compensation and a second cause of action for race, national origin and age discrimination. Famuyiwa alleged that Upward Bound denied him raises, denied equal pay, and denied equal medical benefits. He also alleged that he worked 313 overtime hours for which he was not compensated, and that Upward refused to pay the \$110.77 pay period housing allowance. Finally, he alleged that Upward Bound wrongfully withdrew employer contributed funds from his 401K plan.

Upward Bound filed a demurrer. In response, on October 4, 2004, Famuyiwa filed an amended complaint for damages. There, he alleged race, national origin and race discrimination, disparate treatment, failure to pay overtime compensation, and wrongful withdrawal of funds from Famuyiwa's 401K plan.

6. *Case Is Transferred to Another Court*

On October 6, 2004, Famuyiwa filed a notice of change of case status from limited to unlimited. That same day, defendants filed a demurrer to the amended complaint.

On December 6, 2004, the West District of the Los Angeles County Superior Court issued a notice of transfer of action. The court advised the parties that the case had been assigned to the Santa Monica branch of the superior court and that the case had a new case number, SC083683. The court assigned the case to the Honorable Jacqueline A. Connor. In response, defendants re-filed the demurrer to the amended complaint.

7. *Famuyiwa's Supplemental Complaint*

While defendants' demurrer to the amended complaint was pending, on January 10, 2005, Famuyiwa filed a supplemental complaint. In response, defendants

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<sup>3</sup> The limited jurisdiction was assigned case number, 04C01183.

filed a motion to strike the supplemental complaint. Defendants asserted that the trial court had not given Famuyiwa leave to file the additional pleading.

8. *Trial Court Holds Case Management Conference*

On January 21, 2005, the trial court conducted a case management conference. At the conference, Los Angeles County Superior Court Judge Connor informed the parties that she was familiar with the work of Upward Bound. The parties did not object to Judge Connor continuing to hear the matter.

9. *Trial Court Rules on Demurrer and Motion to Strike*

On March 2, 2005, the trial court granted defendants' motion to strike Famuyiwa's supplemental complaint. The trial court also sustained defendants' demurrer to the amended complaint. The trial court sustained without leave to amend Famuyiwa's causes of action for unpaid housing allowance, unpaid overtime compensation, and withdrawal of funds from the 401K plan. As to these labor-related claims, the trial court explained: "The unpaid housing allowance and overtime compensation claims were previously heard and denied by the Division of Labor Standards Enforcement [(DLSE)]; thereafter Plaintiff had 10 days in which to file an appeal of the administrative decision. . . . The Amended Complaint as well as the DLSE decision (of which this Court takes judicial notice) indicate that the Plaintiff never appealed the adverse decision on those claims; therefore, the claims are now barred. The 401(k) claim is preempted by ERISA."

With respect to the discrimination claim based upon age, national origin and alleged disparate treatment, as to defendant Upward Bound, the trial court sustained the demurrer with 10 days leave to amend. The court stated that Famuyiwa had not adequately alleged each of the required elements of the discrimination claim, but that there was a possibility that Famuyiwa could remedy the defect. As to defendant Parker,

Upward Bound's executive director, the trial court sustained the demurrer to the discrimination cause of action without leave to amend.<sup>4</sup>

10. *Famuyiwa Files Second Amended Complaint*

On March 17, 2005, Famuyiwa filed a second amended complaint. There, against Upward Bound, he alleged causes of action for discrimination (age, race, and national origin); intentional infliction of emotional distress; breach of the covenant of good faith and fair dealing, and breach of contract. Famuyiwa did not allege any causes of action against defendant Parker.

With respect to the discrimination claim, plaintiff alleged that between November 1999 and May 2003, Upward Bound hired four new employees under the age of 40, all of whom received pay raises and employment benefits. Famuyiwa alleged that he was a 54-year-old Nigerian person who did not receive raises or benefits because of his age, race and national origin. Famuyiwa alleged that he was forced to resign and thus, constructively discharged.

11. *Upward Bound Files Motion to Strike*

On April 12, 2005, Upward Bound filed a motion to strike the causes of action for intentional infliction of emotional distress; breach of the covenant of good faith and fair dealing, and breach of contract. Upward Bound asserted that the trial court had not given Famuyiwa leave to file additional causes of action other than the discrimination claim.

The trial court granted the motion to strike. Upward Bound then filed an answer to the discrimination cause of action in the second amended complaint.

12. *Famuyiwa Files Motion to Disqualify Judge Connor*

On June 14, 2005, Famuyiwa filed a motion to disqualify Judge Connor pursuant to Code of Civil Procedure section 170.6.<sup>5</sup> He asserted that the judge was biased.

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<sup>4</sup> The trial court explained: "As to Defendant Parker, the Amended Complaint alleges no basis for his individual liability, and there is no basis in the law for indirect liability based on one's ownership or control of an entity."

<sup>5</sup> Unless otherwise indicated, all unspecified statutory references are to the Code of Civil Procedure.

On June 22, 2005, the trial court denied the motion on the basis that it was untimely. The court also stated that Judge Connor “had never done any legal work on behalf of Defendant Upward Bound House, but that she had merely indicated in paperwork circulated in the community that she supported their work.” Famuyiwa did not seek writ review of the order denying the motion to disqualify.

13. *Famuyiwa Seeks Leave to Amend*

On July 27, 2005, Famuyiwa filed a motion for leave to amend. He sought leave to allege additional causes of action, including breach of the covenant of good faith and fair dealing, breach of contract, and intentional infliction of emotional distress.

On August 24, 2005, the trial court granted leave to amend to add a cause of action for breach of the implied covenant of good faith and fair dealing. The trial court denied leave to add causes of action for breach of contract and intentional infliction of emotional distress.

Upward Bound filed a revised answer to the two causes of action asserted by Famuyiwa, discrimination and breach of the covenant of good faith and fair dealing.

14. *Upward Bound Files Motion for Summary Judgment/Summary Adjudication*

On November 16, 2005, Upward Bound filed motion for summary judgment, or alternatively, a motion for summary adjudication. The motion was set for hearing on February 2, 2006.

Upward Bound presented the following evidence regarding Famuyiwa’s job performance and the reasons for his termination. Upward Bound’s executive director, Parker, declared that Famuyiwa at times demonstrated a reluctance and sometimes a complete refusal to perform designated job duties. In addition, according to Parker, Famuyiwa had behavioral problems with staff and residents of Upward Bound.

For example, on May 2, 2000, Upward Bound sent Famuyiwa a written communication called an “On-Site Manager Follow-up.” The communication informed Famuyiwa that he needed to meet with his supervisor to discuss his employment situation. Parker declared that the purpose of the meeting was to discuss Famuyiwa’s



non-compliance with supervisor requests, his verbal assaults and purchasing personal property from one of the residents.

Famuyiwa met with his supervisor on July 7, 2000, who made a written record of the discussion. According to the record of employee counseling, Upward Bound advised Famuyiwa that he knew he was supposed to attend weekly staff/resident meetings, but was failing to attend. In addition, Upward Bound notified him that staff members had observed him verbally assaulting others. Finally, Upward Bound advised Famuyiwa that he knew it was an ethical violation to purchase personal property from one of the residents.

Upward Bound also presented evidence that residents had complained about Famuyiwa. For example, on August 3, 2000, a resident wrote to executive director Parker that Famuyiwa had yelled at her children. The resident wrote that on another occasion, Famuyiwa had pushed the resident's youngest child so hard that the boy fell down.

On September 25, 2000, Upward Bound issued Famuyiwa a written reprimand. Famuyiwa's supervisor, Tracy Woodburry-Jackson (Woodburry-Jackson), observed Famuyiwa clocking in to work, but then going back into his apartment. She wrote that it was not acceptable for him to be in his unit during working hours. She also explained that he was required to work eight-hour shifts, with two 15-minute and one 30-minute break.

Woodburry-Jackson also explained that she would no longer tolerate Famuyiwa clocking by hand-writing the time on the time cards. She explained that Famuyiwa needed to have the correct time stamped on the time card by the time clock, or the hours would not be counted.

On March 13, 2001, Upward Bound's executive director, Parker, provided Famuyiwa with a written communication entitled "Notice to Correct and Improve." There, Parker counseled Famuyiwa that discipline would result from a failure or refusal to carry out job assignments and management requests. Parker noted that Upward Bound had repeatedly counseled Famuyiwa to remain outside his unit during working hours.

Parker also noted that in November 2000, Famuyiwa signed a statement acknowledging that he was not to be in his unit during the working hours. Parker explained that, despite the oral and written counseling, “you still disappear for hours, unsupervised, into your apartment during your workday.”

Parker further noted that Upward Bound had counseled Famuyiwa to clock in and out when leaving work. Parker also stated that Famuyiwa had signed a written acknowledgement of the need to clock in and out. Again, despite the oral and written counseling, Parker noted that in March 2001, Famuyiwa attended a medical appointment, but failed to clock out for a six-hour time period.

In the communication, Parker placed Famuyiwa on three months probation. He warned Famuyiwa that further behavior of this type could result in a week’s suspension without pay or termination of employment. In closing, Parker reiterated that Upward Bound had asked Famuyiwa to vacate his apartment to make space for another homeless family. Parker explained that Upward Bound was contractually authorized to change the terms of Famuyiwa’s employment. Parker asked Famuyiwa to make arrangements to move as soon as possible.

On April 9, 2001, Upward Bound employee Leda Shapiro provided Famuyiwa with a written communication concerning breaks and lunch. In this counseling statement, Upward Bound advised Famuyiwa of the proper manner in which to take breaks and meal breaks. Upward Bound instructed Famuyiwa that he was not to lump his breaks together, but that the breaks must be taken separately.

On July 5, 2001, program manager, Woodburry-Jackson, sent executive director Parker a written memorandum concerning Famuyiwa’s recent conduct. There, she noted that Famuyiwa refused a direct order to place a screen door on one of the units. Famuyiwa told Woodburry-Jackson that it was after his work hours, and, according to Woodburry-Jackson, he yelled at her and was verbally abusive. Woodburry-Jackson informed Parker that Famuyiwa consistently behaved this way when asked to complete a job task.

As evidence of Famuyiwa's refusal to comply with proper job-related requests, executive director Parker noted that on January 19, 2001, Upward Bound asked Famuyiwa to vacate his apartment. Parker noted that during 2001, 2002 and 2003, until his resignation, Famuyiwa refused to vacate the apartment. Upward Bound never attempted to evict Famuyiwa from the residence.

Upward Bound presented evidence that one of Famuyiwa's co-workers used race-related language during an argument with Famuyiwa. Famuyiwa's personnel file also contained a March 20, 2003 "Report of Incident." According to the report, Famuyiwa and a co-worker named Louis Cooper became involved in a heated argument. During the heat of the argument, Copper called Famuyiwa an "African," or stated something like, "go back to Africa." Executive Director Parker immediately counseled Cooper to use only people's real names.

Upward Bound also presented substantial evidence concerning the race and age of its employees. Upward Bound's executive director, Parker, declared that in 2005, Upward Bound had 18 employees. Of these employees, five were African-American, nine employees were over the age of forty-five and four employees were born outside of the United States.

Parker further declared that during Famuyiwa's employment, he had nine co-workers who were African-American. In addition, there were eight co-employees who were over the age of 45, and at least one employee who was born outside the United States.

Parker also noted that during Famuyiwa's term of employment, he (Parker) personally hired the current program director, Tracy Woodburry-Jackson, who was an African-American woman. Woodburry-Jackson became Famuyiwa's direct supervisor. She was also the only employee who Parker ever promoted. In 2003, he promoted her to the position of program manager.

15. *Famuyiwa's Opposition to the Motion for Summary Judgment*

On January 18, 2006, Famuyiwa filed an opposition to the motion for summary judgment. In his opposition, Famuyiwa did not seek a continuance pursuant to section 437c, subdivision (h), to conduct additional discovery.

In his separate statement, Famuyiwa purported to dispute many of Upward Bound's facts, but failed to provide any evidence or evidentiary citations to support the alleged actual disputes. Famuyiwa cited to purported exhibits; however, no such exhibits are contained in the record on appeal.

Pursuant to his declaration, Famuyiwa declared that he was forced to resign, and that he was subjected to harassment, intimidation and unlawful discrimination. Famuyiwa presented no evidence of any specific examples of harassment or intimidation.

In addition, he claimed that he was paid incorrect amounts, received no raises and had his medical co-payment increased three times during the course of his employment. Famuyiwa, however, presented no evidence that any other persons received a raise. Nor did he present any evidence one way or another concerning the medical co-payments of other employees.

Famuyiwa also claimed that he was denied a promotion. He declared that he was recommended for the position of Program Manager, but that Upward Bound's executive director, Parker, rejected the recommendation.

16. *Trial Court Grants Motion for Summary Judgment*

On February 1, 2006, the trial court faxed the parties its tentative ruling in favor of Upward Bound, upon which the parties submitted. The trial court then granted Upward Bound's motion for summary judgment. The trial court sustained Upward Bound's objections to Famuyiwa's evidence on the basis that none of the evidence was properly authenticated.

With respect to the claim of constructive discharge, the trial court found that the conditions about which plaintiff complained were not so intolerable that a reasonable person would have resigned. The trial court explained that Famuyiwa's complaint was that he did not receive pay raises. Rejecting this as a basis for constructive discharge in

this case, the court stated: “Complaints by employees regarding deserving [pay] raises [are] ubiquitous in our society and cannot support plaintiff’s position. Relying on evidence provided by Defendant, it is clear that Plaintiff’s long and documented history of poor job performance played a significant factor in the decision not to give Plaintiff a pay increase. Plaintiff fails to create a triable issue of material fact regarding the conditions surrounding his employment as none of the evidence provided by Plaintiff is properly authenticated.”

With respect to the claim for discrimination, the trial court found that Upward Bound provided sufficient evidence to negate two elements of the cause of action: (1) that Famuyiwa was qualified for a position he sought or was performing competently in the position held; and (2) that Famuyiwa suffered an adverse employment action such as termination, demotion or denial of an available job. The trial court explained: “As evidenced by Plaintiff’s documented history of poor job performance, Plaintiff was not performing competently at his position. Moreover, the Court notes that Plaintiff did not suffer any adverse employment action as Defendant never reduced Plaintiff’s pay, never demoted him, never evicted him, and never terminated him.”

Finally, with respect to the cause of action for breach of the implied covenant of good faith and fair dealing, the trial court ruled that plaintiff could not prevail on this cause of action because Upward Bound presented evidence that Famuyiwa was an at-will employee.

The trial court entered judgment for Upward Bound. Famuyiwa filed a timely notice of appeal.

## **CONTENTIONS**

Famuyiwa contends: (1) the trial court erred by denying the section 170.6 motion to disqualify Judge Connor; (2) the trial court erred by sustaining Upward Bound’s demurrer to Famuyiwa’s causes of action for failure to pay overtime compensation and a housing allowance; (3) the trial court erred by sustaining Upward Bound’s motion to strike Famuyiwa’s causes of action for breach of contract and intentional infliction of emotional distress; and (4) the trial court erred by granting summary judgment as to the

causes of action for constructive discharge, discrimination (age, race and national origin), and violation of the covenant of good faith and fair dealing.

## DISCUSSION

### 1. *The Order Denying the Section 170.6 Motion to Disqualify Not Appealable*

We not reach the issue of whether the trial court erred by denying the motion to disqualify pursuant to section 170.6.

Former section 170.3, subdivision (d), provided in pertinent part: “The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought within ten days of notice to the parties of the decision and only by the parties to the proceeding.”<sup>6</sup> (See also *Guedalia v. Superior Court* (1989) 211 Cal.App.3d 1156, 1159 [“Accordingly, we conclude that section 170.3, subdivision (d) is the exclusive appellate remedy for any motions to disqualify a judge, including peremptory challenges pursuant to section 170.6.” (*Id.* at p. 1163.))].)

In conclusion, the denial of the motion to disqualify does not constitute a valid basis to challenge the judgment in favor of Upward Bound.

### 2. *The Trial Court Did Not Err by Sustaining Without Leave to Amend the Demurrer to Famuyiwa’s Causes of Action for Failure to Pay Overtime Compensation and a Housing Allowance*

#### a. *Standard of Review*

In *Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, the court set forth the appropriate standard of review: “A demurrer tests the legal sufficiency of the complaint, and the granting of leave to amend involves the trial court’s discretion. Therefore, an appellate court employs two separate standards of review on appeal. [Citations.] [¶] The complaint is reviewed de novo to determine whether it contains sufficient facts to state a cause of action. [Citation.] . . . [¶] Where a demurrer is

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<sup>6</sup> In 2006, the Legislature amended section 170.3, subdivision (d). The amendment did not materially alter section 170.3, subdivision (d).

sustained without leave to amend, the reviewing court must determine whether the trial court abused its discretion in doing so. [Citation.] It is an abuse of discretion to deny leave to amend if there is a reasonable possibility that the pleading can be cured by amendment. [Citation.]” (*Id.* at pp. 321-322.)

b. *Analysis*

In the amended complaint filed January 10, 2005, Famuyiwa alleged causes of action for failure to pay overtime compensation and a housing allowance. The trial court concluded these causes of action were time barred. We agree.

The three-year statute of limitation in section 338, subdivision (a), applies to actions for unpaid overtime compensation. (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 168.) With respect to Famuyiwa’s claim for an unpaid housing allowance, because this cause of action is not based upon an oral or written contract, it is also subject to the three-year statute of limitations set forth in section 338, subdivision (a).<sup>7</sup> (*Cuadra v. Millan* (2000) 17 Cal.4th 855, 859, disapproved on other grounds in *Samuels v. Mix* (1999) 22 Cal.4th 1, 16, fn. 4.)

A cause of action for unpaid wages accrues when the wages first become legally due. (*Cuadra v. Millan, supra*, 17 Cal.4th at p. 859.) By his amended complaint, Famuyiwa alleged that he was entitled to this compensation commencing in December 1999. Famuyiwa did not initiate this lawsuit until August 10, 2004. The causes of action for unpaid overtime compensation and an unpaid housing allowance are therefore time barred by the three-year statute of limitations set forth in section 388, subdivision (a).

In response, Famuyiwa suggests that the statute of limitations should be tolled. Famuyiwa asserts that because the deputy labor commissioner in the October 16, 2001 denial of his claim, did not advise him pursuant to Labor Code section 98.7, subdivision (a), of the right to initiate a court action to contest the decision denying his claim, his

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<sup>7</sup> The resident manager agreement, found at pages 372 to 386 of the Clerk’s Transcript, does not contain any reference to a housing allowance of \$110.77.

causes of action for failure to pay overtime and a housing allowance are timely.<sup>8</sup> We reject this argument.

Famuyiwa has not shown prejudice by the failure of the deputy labor commissioner to notify him of his right to initiate a lawsuit to contest the action by the Labor Commissioner in denying the claim. In his amended complaint filed October 6, 2004, plaintiff acknowledged that after the deputy labor commissioner denied the claim, Famuyiwa met with an attorney, who advised Famuyiwa of his right to appeal the administrative order. Thus, Famuyiwa cannot place his failure to initiate court action to contest the denial of his administrative claim upon the deputy labor commissioner's failure to comply with Labor Code section 98.7, subdivision (d). Famuyiwa was aware of his right and failed to act accordingly. We therefore conclude that Famuyiwa has not shown that the applicable three-year statute of limitations should have been tolled.

3. *The Trial Court Did Not Err by Denying, in Part, Famuyiwa's Motion to Amend the Pleadings*

The trial court did not err by denying Famuyiwa leave to add causes of action for alleged breach of contract and intentional infliction of emotional distress.

a. *Standard of Review*

We review for abuse of discretion. (*Lee v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 848, 853.) On this record, because there is no reasonable possibility that Famuyiwa can cure the pleading defects by amendment, the trial court did not abuse its discretion.

b. *Analysis*

(i) *Breach of Contract Cause of Action*

In his motion for leave to amend the complaint to include a cause of action for breach of contract, Famuyiwa asserted that Upward Bound contractually agreed to give

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<sup>8</sup> Labor Code section 98.7, subdivision (d)(1) provides in pertinent part: "When dismissing a complaint, the Labor Commissioner shall advise the complainant of his or her right to bring an action in an appropriate court if he or she disagrees with the determination of the Labor Commissioner[.]"



him scheduled raises and health benefits. It is undisputed, however, that Famuyiwa was an at-will employee. Moreover, Famuyiwa executed an integrated at-will employment agreement. The agreement provided, among other things, that Upward Bound could terminate the employment relationship “[at] any time for any reason, or no reason, with or without cause.” The agreement also provided that the terms of Famuyiwa’s employment could be changed with or without cause.

Under these facts and pursuant to *Starzynski v. Capital Public Radio, Inc.* (2001) 88 Cal.App.4th 33, 38 and *Halvorsen v. Aramark Uniform Services, Inc.* (1998) 65 Cal.App.4th 1383, 1387-1389, Famuyiwa could not maintain a cause of action for breach of contract. The trial court therefore did not abuse its discretion by denying leave to amend to add a cause of action for breach of contract.

(ii) *Intentional Infliction of Emotional Distress*

Because we conclude that the trial court did not err by summarily adjudicating the discrimination cause of action in favor of Upward Bound, the trial court did not abuse its discretion by denying Famuyiwa leave to amend to allege a cause of action for intentional infliction of emotional distress.

4. *The Trial Court Did Not Err by Granting Summary Judgment  
in Favor of Upward Bound*

a. *Standard of Review*

This court reviews de novo a trial court’s grant of summary judgment. (*Carlton v. Quint* (2000) 77 Cal.App.4th 690, 698-699.) Summary judgment is properly granted if no question of fact exists and the pleadings raise issues that may be decided as a matter of law. (*Sanchez v. Swinerton & Walberg Co.* (1996) 47 Cal.App.4th 1461, 1464.)

In *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, the California Supreme Court explained: “[I]n moving for summary judgment, a ‘defendant . . . has met’ his ‘burden of showing that a cause of action has no merit if’ he ‘has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts

exists as to that cause of action or a defense thereto.’ ” (*Id.* at p. 849, citing § 437c, subd. (o)(1).)

b. *Analysis*

The trial court did not err by granting summary judgment in favor of Upward Bound.

(i) *Constructive Discharge*

In *Turner v. Anheuser Busch, Inc.* (1994) 7 Cal.4th 1238, the California Supreme Court set forth the elements necessary to show constructive discharge. The court explained: “The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee. [¶] . . . [¶] In order to amount to a constructive discharge, adverse working conditions must be unusually ‘aggravated’ or amount to a ‘continuous pattern’ before the situation will be deemed intolerable. In general, ‘[s]ingle, trivial, or isolated acts of [misconduct] are insufficient’ to support a constructive discharge claim. [Citation.] Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge.” (*Id.* at pp. 1246-1247, fn. omitted.)

The trial court did not err by concluding that Famuyiwa did not raise a triable issue of material fact to support a claim of constructive discharge. In other words, Famuyiwa has not shown the existence of intolerable working conditions such that a reasonable person would have resigned. Accepting Famuyiwa’s evidence, he has shown that: (1) he was denied unidentified pay raises; (2) he was allegedly not paid overtime compensation or a housing allowance; (3) Upward Bound wrongfully withdrew funds from his 401K; (4) an African American person, Woodburry-Jackson, obtained a position for which Famuyiwa believed he was qualified, and (5) another employee called him an African (or stated go back to Africa).

This evidence does not constitute aggravated working conditions or a continuous pattern of unacceptable working conditions. Famuyiwa does not identify which pay raises he did not receive or whether any other Upward Bound employees received the pay raises. He has not shown any merit to the allegation that he was wrongfully denied overtime compensation or a housing allowance. In addition, he has not shown that the hiring of Woodburry-Jackson was discriminatory or otherwise intolerable. Finally, the person who made a racial remark to Famuyiwa was a co-worker, not a supervisor. In addition, Executive Director Parker immediately counseled that person to refer to others by their proper names.

(ii) *Discrimination*

In *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, the California Supreme Court explained that to establish a prima facie case of discrimination, “the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive.” (*Id.* at p. 355.)

The trial court did not err by concluding that Famuyiwa failed to set forth sufficient evidence as to the second element necessary to establish a prima facie showing of discrimination. Upward Bound carried its burden of production to show that Famuyiwa had a long history of not performing competently as the resident manager of the “Family Place” living center. He was reprimanded repeatedly for chronic problems, including clocking in and out, disappearing into his apartment during working hours and engaging in verbal assaults of staff and residents. In fact, Famuyiwa showed a reluctance to perform certain job required duties. In March 2001, Upward Bound’s executive director, Parker, placed Famuyiwa on three months probation because of unsatisfactory job performance and for failing to vacate his apartment as requested.

In the face of Upward Bound’s evidence concerning Famuyiwa’s poor job performance, his reluctance and refusal to perform required job responsibilities,

Famuyiwa failed to show that he was performing competently in the position he held. For this reason, the trial court did not err by adjudicating this cause of action in favor of Upward Bound.

(iii) *Breach of the Covenant of Good Faith and Fair Dealing*

In Famuyiwa's motion to amend the pleadings, he argued that Upward Bound breached the covenant of good faith and fair dealing because Upward Bound did not treat similarly situated employees in the same fashion, and because Upward Bound constructively discharged Famuyiwa.

Famuyiwa, however, did not carry a burden of production to show that any other similar situated employee was treated differently. In addition, as explained above, Famuyiwa has not shown that Upward Bound constructively discharged him. Thus, Famuyiwa did not raise a triable issue of material fact to support either basis for his claim.

In any event, because of the nature of his at-will employment contract, pursuant to *Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th 317, Famuyiwa cannot show a violation of the covenant of good faith and fair dealing. The *Guz* court explained: "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*. [Citation.] . . . [The covenant] cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Id.* at pp. 349 -350.)

The agreement actually made by the parties was an at-will employment agreement. Famuyiwa has not shown that Upward Bound did anything to frustrate his right to receive the benefits of the agreement actually made. We conclude that the trial court did not err by adjudicating this cause of action in favor of Upward Bound.

**DISPOSITION**

The judgment is affirmed. Upward Bound is awarded costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.